92-86

No.

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1992

J.L. SIVLEY, ET AL., PETITIONERS

*v.*

CARLOS SOLER

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTION PRESENTED

Whether federal courts are authorized, in a lawsuit brought by an incarcerated alien, to enforce 8 U.S.C. 1252(i) by granting injunctive relief that requires the Immigration and Naturalization Service to commence deportation proceedings against the alien.

## PARTIES TO THE PROCEEDING

Petitioners are J.L. Sivley, Warden of the Federal Correctional Institution at Safford, Arizona; the Bureau of Prisons; and the Immigration and Naturalization Service.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Solicitor General, on behalf of J.L. Sivley et al., respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 942 F.2d 597. The opinion of the district court (App., *infra*, 19a-22a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on August 1, 1991. A timely petition for rehearing was denied on April 9, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATUTORY PROVISIONS INVOLVED

1. Section 1252(i) of Title 8, United States Code, provides as follows:

> In the case of an alien who is convicted of an offense which makes the alien subject to deportation, the Attorney General shall begin any deportation proceeding as expeditiously as possible after the date of the conviction.

2. Section 1361 of Title 28, United States Code, provides as follows:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

3. Section 702 of Title 5, United States Code, provides as follows, in pertinent part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

## STATEMENT

1. Respondent is a native of Cuba who came to the United States in 1970.[1] After being convicted of distribution of cocaine, in violation of 21 U.S.C. 841 (a)(1), he was incarcerated in the Federal Correctional Institution in Safford, Arizona. The Immigration and Naturalization Service (INS) subsequently filed a detainer against respondent, requesting prison

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[1] Because the district court dismissed the complaint without requiring factual development, the record does not contain details regarding respondent's immigration status. Apparently, respondent was excludable at the time he arrived under 8 U.S.C. 1182(a)(20), but was paroled into the United States under Section 1182(d)(5)(A).

authorities to notify INS before releasing or transferring respondent.[2] App., *infra*, 4a, 19a, 30a.

2. Respondent then filed this action in the United States District Court for the District of Arizona, contending that petitioners had violated their obligation under 8 U.S.C. 1252(i) to commence deportation proceedings against incarcerated aliens "as expeditiously as possible after the date of the conviction." Respondent claimed that "the INS has a long-standing policy of refusing to begin any deportation proceedings until after release from [Bureau of Prisons] custody." App., *infra*, 26a. Accordingly, respondent sought an order requiring the government to hold his deportation hearing within sixty days. *Id.* at 28a. Although the section describing the relief sought did not explicitly identify the basis for relief, the heading made clear that the complaint sought a writ of mandamus, because it indicated that the complaint sought a "writ to compel agency action pursuant to Title 28 USC § 1361." *Id.* at 23a.[3]

The district court dismissed the complaint without calling for a response from the government. App., *infra*, 19a-22a. The court explained that the Eighth Circuit had held in *Gonzalez* v. *INS*, 867 F.2d 1108,

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[2] See 8 U.S.C. 1182(a)(23)(A) (1988) (authorizing exclusion of any alien "convicted of a violation of * * * any law or regulation of * * * the United States * * * relating to a controlled substance"). The grounds of exclusion were reorganized by Section 601(a) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5067, and this provision now appears as 8 U.S.C. 1182(a)(2)(A)(i)(II) (Supp. II 1990).

[3] Section 1361 of Title 28, United States Code, provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

1109-1110 (1989), that "[S]ection 1252(i) does not provide incarcerated aliens an implied private right of action to compel an immediate deportation hearing." App., *infra*, 21a-22a.

3. A divided panel of the court of appeals reversed. App., *infra*, 1a-16a. First, the court concluded that it was appropriate to enforce Section 1252(i) by issuance of a writ of mandamus. App., *infra*, 6a-10a. The court explained that the alleged "policy of delaying prisoner deportation hearings until the expiration of a prisoner's term transgresses the limits of any discretion delegated to the INS by Congress." App., *infra*, 9a (brackets, internal quotation marks, and citations omitted). Thus, the court reasoned, mandamus was appropriate.

Although respondent had not relied on the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, (APA), the court also concluded that respondent had stated a claim for relief under that statute as well. App., *infra*, 10a-11a. The court noted that judicial review under the APA is limited to "final agency action," 5 U.S.C. 704, but reasoned that INS's alleged policy of delaying deportation hearings represented "a final agency decision not to follow the statutory mandate in this case." App., *infra*, 11a.

The court also rejected the district court's reliance on the Eighth Circuit's decision in *Gonzalez*. App., *infra*, 11a-13a. The court acknowledged that *Gonzalez* had declined to recognize an implied right of action under Section 1252(i), but explained that the existence of an implied right of action was irrelevant in this case, because petitioner was seeking relief under the APA and the Mandamus and Venue Act of 1962 (Mandamus Act), 28 U.S.C. 1361, both of which create independent rights of action.

Finally, the court rejected the government's argument that respondent did not have standing. App., *infra*, 13a-15a. First, it concluded that respondent met the constitutional requirements for standing, noting that he had alleged an injury in fact caused by INS's failure to hold a deportation hearing (continued restriction of his liberty) and had alleged that the injury would be redressed by the requested relief (holding a deportation hearing). *Id.* at 13a-14a. Second, it concluded that respondent met the statutory requirements for standing under the APA and the Mandamus Act. It acknowledged that standing was available under the APA only if "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute . . . in question." *Id.* at 14a (quoting *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150, 153 (1970)). The court noted that the purpose of Section 1252(i) was to reduce prison overcrowding caused by INS delay and that the statute was "apparently enacted for the benefit of taxpayers rather than incarcerated aliens." App., *infra*, 14a-15a. Nevertheless, because respondent's suit would have the effect of reducing overcrowding, it concluded that standing was appropriate. Based on the same reasoning, the court also found that respondent had standing to seek a writ of mandamus. *Id.* at 15a.

Judge Rymer dissented. App., *infra*, 16a. She agreed that the alleged policy apparently would violate Section 1252(i), but nevertheless concluded that respondent was not entitled to relief, because there was no "duty owed to him, as the Mandamus Act requires." App., *infra*, 16a. Relying on the Eighth Circuit's decision in *Gonzalez*, she concluded that

"[f]ederal prisoners were not the intended beneficiaries of [Section 1252(i)]; the legislative history indicates that states, and overcrowded prisons, were." *Ibid.* Judge Rymer declined to address the APA claim, because respondent had not raised it and the panel had not given the government an opportunity to address it. *Ibid.*

4. The government filed a timely petition for rehearing and suggestion for rehearing en banc. While the petition was pending, respondent completed his prison sentence. Following its statutory obligation to detain aliens who complete sentences imposed for an aggravated felony, see 8 U.S.C. 1226(e) (Supp. II 1990), INS promptly took respondent into custody and held an exclusion hearing,[4] at which he was found excludable. See App., *infra*, 45a-46a.[5] Accordingly, on October 10, 1991, the government advised the court of appeals that the case no longer involved a live controversy and filed a motion seeking dismissal of the case and vacation of the judgment of

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[4] Because petitioner was never admitted into the United States, but only paroled, see note 1, *supra*, he remained subject to exclusion (rather than deportation) notwithstanding his lawful physical presence in the country. As Section 1182(d)(5)(A) of Title 8 provides:

> [P]arole of [an] alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

[5] Respondent did not appeal to the Board of Immigration Appeals; the exclusion order is now final. Respondent has not left the country because the government has not yet secured appropriate documentation from Cuban authorities.

the court of appeals. See *id.* at 41a-44a. The court of appeals denied the motion without opinion on November 4, 1991. *Id.* at 17a. On April 9, 1992, the court denied the petition for rehearing and rejected the suggestion for rehearing en banc. *Id.* at 18a.

## REASONS FOR GRANTING THE PETITION

The decision of the court of appeals involves a claim that is no longer in dispute. Respondent challenged the government's alleged policy of deferring deportation hearings for incarcerated aliens until the conclusion of their prison sentence; the relief sought by respondent was an order directing the government promptly to commence proceedings to determine respondent's immigration status, so that respondent's status would be determined before his prison sentence was completed. Because he completed his prison sentence before this proceeding became final, he was unable to obtain the relief he sought.[6] Hence, there no longer is a dispute between the parties regarding the government's obligation to commence proceedings to remove respondent from the country "as expedi-

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[6] After completion of his sentence, the government determined respondent's immigration status and thus has taken any action that plausibly could have been ordered pursuant to respondent's complaint. In this regard, we note that the complaint, like Section 1252(i), refers to a deportation hearing. Technically, the statute did not apply to respondent, because he was never admitted to the United States; the proper procedure to expel an unadmitted alien paroled into the United States was to hold an exclusion hearing. See *Landon* v. *Plasencia*, 459 U.S. 21, 31-32 (1982). In sum, because INS has held the proper hearing—an exclusion hearing—and determined that respondent is excludable, it has satisfied any obligation respondent could allege it has under Section 1252(i).

tiously as possible after the date of the conviction," 8 U.S.C. 1252(i). The court of appeals nevertheless declined to vacate its decision on grounds of mootness. Because the decision has far-reaching consequences for INS, we respectfully request this Court to vacate the judgment of the court of appeals and remand the case with instructions to dismiss the complaint.

Under *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950), "[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." See Robert L. Stern et al., *Supreme Court Practice* § 18.5 (6th ed. 1986). Leaving the judgment in place would subject the government to the adverse precedential effects of a decision, review of which was prevented through happenstance." *Munsingwear*, 340 U.S. at 40. The precedential impact of the decision is significant. The Office of Immigration Litigation in the Civil Division of the Department of Justice advises us that it has received notice of more than 300 cases seeking relief under Section 1252(i) since the panel's decision in this case, more than 90 of which have been filed in the Ninth Circuit alone. Unless the Court vacates the judgment of the court of appeals in this case, that decision will govern disposition of all of those cases filed in the Ninth Circuit.[7] Further, unless the de-

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[7] The effects of the decision below have been exacerbated by the decision of a district court concluding that venue is proper in the Ninth Circuit for prisoners sentenced in the Ninth Circuit, even if the prisoner is incarcerated elsewhere in the country. See *United States* v. *Rodpool*, No. CR 88-199(A)

cision is vacated, it is possible that all of the cases in the Ninth Circuit will become moot before review on certiorari, because lower courts would be unlikely to stay orders requiring the government to hold deportation hearings in the face of the precedential holding in this case; such cases generally would remain justiciable only if this Court were willing to grant a stay.

If the case had not become moot, it is likely that this Court would have granted review. The decision of the court of appeals conflicts with the decisions of several circuits. Every other circuit to consider the question has concluded that incarcerated aliens cannot enforce the Attorney General's obligation to commence deportation proceedings under Section 1252(i). First, as the court of appeals recognized, the Eighth Circuit has concluded that it was proper to dismiss a substantially identical complaint, which sought a writ of mandamus to compel a prompt deportation proceeding under Section 1252(i). See *Gonzalez* v. *INS*, 867 F.2d 1108 (1989).[8] The Sev-

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SVW (C.D. Ca. May 28, 1992), slip op. 6-11. We have lodged a copy of the *Rodpool* opinion with the Court and provided a copy to respondent.

Another event suggesting that *Soler* will have a broad precedential impact is the Ninth Circuit's recent unpublished decision in *Fabela Martinez* v. *Wells*, No. 91-55566 (June 12, 1992). In that case, the court of appeals addressed a pro se complaint seeking a writ of habeas corpus compelling INS to commence deportation proceedings against an incarcerated alien. Although the complaint did not refer to *Soler* or the APA, or seek a writ of mandamus, the court of appeals concluded that the plaintiff had stated a cause of action under *Soler* and thus reversed the district court's decision dismissing the complaint. We have lodged a copy of the *Fabela Martinez* opinion with the Court and provided a copy to respondent.

[8] Although the *Gonzalez* opinion does not expressly indicate that 28 U.S.C. 1361 was the basis for the writ of mandamus

enth and Eleventh Circuits have rejected similar suits summarily by citation to *Gonzalez*.[9] Similarly, the Sixth Circuit has dismissed a petition for a writ of habeas corpus on the ground that Section 1252(i) does not authorize private suits by prisoners.[10] See *Santana* v. *Chandler*, No. 92-1212 (5th Cir. May 12, 1992), slip op. 4654-4655 (noting the contrast between the decision in *Soler* and the decisions of other courts of appeals).

The court of appeals suggested that the Eighth Circuit's decision in *Gonzalez* was not controlling in this case, portraying the analysis in *Gonzalez* as limited to a statement that Section 1252(i) did not create a private right of action. See App., *infra*, 11a-12a. Although the Ninth Circuit may have been correct in suggesting that the absence of a private right

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sought in that case, it is clear that the relief was the same as the relief sought here, because Section 1361 is the statutory waiver of sovereign immunity permitting district courts to issue writs of mandamus against federal agencies. See 14 Charles Alan Wright et al., *Federal Practice and Procedure* § 3655, at 232-233 (2d ed. 1985).

[9] See *Orozco* v. *INS*, 911 F.2d 539, 541 (11th Cir. 1990) ("To the extent Orozco's [claims] could be construed as seeking a private right of action under section 1252(i) * * *, this court concurs in the conclusion by the Eighth Circuit in [*Gonzalez*] that an incarcerated alien has no private right of action under section 1252(i)"); *Aguirre* v. *Meese*, 930 F.2d 1292, 1293 (7th Cir. 1991) (affirming denial of a petition for mandamus; "[a]ll we need do is make clear our agreement with [*Gonzalez*], which holds on grounds we find persuasive that section 1252(i) indeed creates no private right of action").

[10] *Prieto* v. *Gluch*, 913 F.2d 1159, 1165 (6th Cir. 1990), cert. denied, 111 S. Ct. 976 (1991) (relying on *Gonzalez* for the conclusion that "Congress did not intend to benefit criminal aliens when it enacted section 1252(i)").

of action under Section 1252(i) is not in itself sufficient reason to dismiss respondent's complaint, the Ninth Circuit failed to note that the result of the *Gonzalez* opinion's analysis—dismissal of a complaint substantially identical to the complaint that respondent filed—directly conflicts with the result in this case. The fact is that the other courts of appeals, following *Gonzalez*, have held that it is proper to dismiss complaints substantially identical to the one filed by respondent. The contrary decision of the court of appeals in this case creates a significant conflict in the circuits.[11]

The basic error of the decision of the court of appeals was its refusal to accord any significance to the conclusion of all courts to consider the question that "Congress did not intend to benefit criminal aliens when it enacted [S]ection 1252(i)," *Prieto*, 913 F.2d at 1165. Rather, Section 1252(i) was intended to aid federal, state, and local prison officials by reducing their expenditures on incarcerating deportable aliens.[12] It is completely implausible to believe that

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[11] As discussed below, we believe that the basis for the analysis of the other courts of appeals (the undisputed conclusion that Section 1252(i) was not enacted for the benefit of incarcerated aliens) supports the results reached by those courts, whether it is explained generally as the absence of a private right of action under Section 1252(i) or more precisely as the lack of standing to enforce Section 1252(i) under the APA or by means of a writ of mandamus.

[12] Senator Simpson explained the purpose of the provision as follows:

> Not only will the Federal prison system benefit from an enhanced program to deport aliens in its custody, but even greater benefits can be anticipated at the State and local level, if the program can reach that far. It may well be that a supplemental request may be necessary to provide for additional personnel and resources to ex-

Congress would have passed the statute to assist respondent by assuring that he would not have to spend time detained by INS after he finished serving his criminal sentence.[13]

The court of appeals acknowledged that Section 1252(i) "was apparently enacted for the benefit of taxpayers rather than incarcerated aliens," App., *infra*, 14a-15a, but nevertheless reasoned that respondent had standing to enforce Section 1252(i), because his suit would advance the purposes of Section 1252(i) by "reducing prison overcrowding caused by INS delay," *id.* at 15a. This reasoning, however, errs in focusing on the effect of the lawsuit rather than the interests the suit seeks to advance. If the inquiry turns on the effect of the lawsuit, as the court of appeals suggested, any individual who can identify a public official who is violating a federal statute would have standing, because an order requiring the official to comply with the statute would further the

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pedite these deportations. However, any such increases would be but a small fraction of the cost to provide prison and jail space for these individuals.

132 Cong. Rec. 33,238 (1986).

[13] This seems especially likely in light of the nature of the relief sought by respondent, an order compelling the government to commence deportation proceedings against him. Cf. *United States* v. *Nixon*, 418 U.S. 683, 693 (1974) ("the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"). Federal courts have not traditionally found that individuals have standing in such cases. See *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985) ("[W]hen an agency refuses to act it generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect."); see also *Franklin* v. *Massachusetts*, No. 91-1502 (June 26, 1992) (Stevens, J., concurring), slip op. 13 (noting that "courts have long been hesitant to intrude" into this area).

purposes of the statute. Such a result, of course, cannot be reconciled with traditional limits on the scope of the adjudicative process. See *Lujan* v. *Defenders of Wildlife*, No. 90-1424 (June 12, 1992), slip op. 17. By contrast, consideration of the interests this suit sought to advance makes it clear that respondent did not have standing to enforce Section 1252(i). As discussed above, this lawsuit sought to advance respondent's interest in avoiding the inconvenience and discomfort of being detained by INS after serving his prison term. This interest—however significant—is quite distinct from the interest in reducing expenditures that led to the enactment of Section 1252(i).

Accordingly, because respondent's interest is not within the "zone of interests" that Congress was addressing when it enacted Section 1252(i), and because the government did not violate "a duty owed to [respondent]" under Section 1252(i), the court should have concluded that respondent did not have standing to enforce Section 1252(i) either under the Mandamus Act or the APA. Because the contrary analysis of the court of appeals conflicts with the decisions of the other courts of appeals to consider Section 1252(i), the issue merits plenary review. Because the resolution of the controversy between the parties makes plenary review untenable in this case, the Court should vacate the judgment of the court of appeals and remand the case with instructions to dismiss the complaint.

## CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded to the court of appeals with instructions to dismiss the complaint.

Respectfully submitted.

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JULY 1992

**APPENDIX A**

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

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No. 89-16051

CARLOS SOLER, PLAINTIFF-APPELLANT

*v.*

ROGER F. SCOTT, Warden, FCI-Safford, AZ; UNITED STATES BUREAU OF PRISONS; U.S. IMMIGRATION AND NATURALIZATION SERVICE, DEFENDANTS-APPELLEES

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Appeal from the United States District Court
for the District of Arizona

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Submitted Oct. 5, 1990 *

Submission Vacated Oct. 12, 1990

Resubmitted Aug. 1, 1991

Decided Aug. 1, 1991

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Before BROWNING, GOODWIN and RYMER, Circuit Judges.

JAMES R. BROWNING, Circuit Judge:

Section 701 of the Immigration Reform and Control Act of 1986 provides:

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* The panel finds this case appropriate for submission without oral argument pursuant to ninth Cir.R. 34-4 and Fed.R. App.P. 34(a).

> In the case of an alien who is convicted of an offense which makes the alien subject to deportation, the Attorney General [through the Immigration and Naturalization Service] shall begin any deportation proceeding as expeditiously as possible after the date of the conviction.

8 U.S.C. § 1252(i) (1988).

Congress enacted Section 701 to accomplish a single objective: to require the INS to abandon its practice of postponing prisoner deportation hearings until after the expiration of a prisoner's sentence. Rather than deporting aliens promptly upon the expiration of their prison sentence, the INS waited until a prisoner completed his or her sentence before even scheduling a hearing to determine whether the prisoner would be deported. These aliens remained in prison while awaiting their deportation hearing. Congress concluded this practice of keeping aliens in prison after they had completed their sentence contributed to prison overcrowding and imposed an unfair, unnecessary and expensive burden on limited federal and state resources. Congress enacted Section 701 to require the INS to begin deportation hearings as soon as possible after conviction so the question of deportation could be resolved before the prisoner's term expired, and if the prisoner was found deportable, deportation could be accomplished promptly. As Representative MacKay, who introduced Section 701 as a floor amendment to the Immigration Reform and Control Act, explained:

> [Section 701] addresses a narrow but a very important issue. It has to do with illegal aliens who are convicted of drug-related crimes, who under Federal law should be deported and who,

> under the policies of the Immigration and Naturalization Service, should be deported on an expedited basis.
>
> The policies require that deportation proceedings begin when a conviction takes place, the idea being that when the sentence is over, the person would be deported.
>
> Now, unfortunately, the very opposite is happending. These people are not being deported; the expedited procedure is not working; the local and State jails are jammed up[;] the Immigration and Naturalization Service has no incentive to give priority to these because the burden of inaction falls on State and local governments and not on the Federal system.
>
> This amendment provides . . . that deportation proceedings will begin when there is a conviction.

132 Cong.Rec. H9794 (October 9, 1986). Representative MacKay proved himself a poor prophet when he added: "I believe this amendment would lead very quickly to a changing of priorities in INS." *Id.*

In the Senate, then-Majority Leader Dole expressed concerns similar to those of Congressman MacKay, noting that the amendment would provide:

> authority for expeditious deportation of convicted felons. This is a particular concern of mine, since there are about 6,000 aliens currently in Federal prisons and many more in the State and local systems.

132 Cong.Rec. S16908 (October 17, 1986).

Senator Dole added:

> They are occupying space that is desperately needed. They are costing the taxpayers millions for their board and keep.

*Id.* at S16909.

Appellant Carlos Soler, a native of Cuba, entered the United States legally in 1970, and is currently in federal prison for a crime that may subject him to deportation. The INS filed a "Detainer," informing prison authorities that Soler might be deportable, but took no further action. A year after his conviction, Soler filed a pro se petition seeking an order to compel the INS to schedule and hold a prompt deportation hearing. Soler alleged "the INS has a long-standing policy of refusing to begin any deportation proceedings until after release from [Bureau of Prisons] custody," and "has no intention" of holding his hearing before that time "unless compelled to[] by this Court."

Soler further alleged that due to the INS' policy he will be forced to remain in prison beyond the expiration of his term while waiting for the INS to decide whether he should be deported: "By delaying actual [deportation] proceedings until after the incarceration for Petitioner's criminal conviction," Soler alleges, "existing government policy guarantees additional costs of incarceration during the post-incarceration proceedings; and this is precisely what Congress sought to avoid in enacting Title 8 U.S.C. § 1252(i)."

The INS does not deny the existence of the policy Soler alleges, nor its consequences. Instead, the INS argues it is "under no duty enforceable by petitioner to accord him a deportation hearing before he completes his criminal sentence. Moreover, any duty which may exist is discretionary, not ministerial, in nature." We disagree.

I

As Soler asserts, the INS' alleged policy is flatly inconsistent with the text and purpose of Section 701.

The words of the statute are mandatory: the "Attorney General [through the INS] *shall* begin any deportation proceeding as expeditiously as possible after the date of the conviction." 8 U.S.C. § 1252(i) (emphasis added). The use of mandatory language strongly indicates Congress intended to limit INS discretion. *See United States v. Chavez*, 627 F.2d 953, 954-55 (9th Cir.1980). Moreover, by specifically referring to "the date of the conviction," Congress plainly intended this date, not the prisoner's scheduled date for release, to be the benchmark for scheduling deportation hearings. If Soler's allegations are true, the INS has decided not to consider the date of conviction at all in scheduling prisoner deportation hearings but instead to be guided by a date of its own choosing, a date much later than the one chosen by Congress.

By use of the phrase "as soon as possible" Congress gave the INS significant discretion in scheduling deportation hearings. It is clear from legislative history, however, that Congress left the INS no discretion to adopt a policy that fixes a departure point for the exercise of scheduling discretion significantly later than the date Congress mandated, and necessarily postpones every deportation hearing beyond expiration of each individual alien's prison term.

Representative MacKay emphasized that the singular purpose of Section 701 was to end the very practice Soler alleges persists. 132 Cong.Rec. H9794 October 9, 1986). Congress' stated intent was to ease the chronic problem of prison overcrowding by "provid[ing] . . . that deportation proceedings will begin *when there is a conviction.*" *Id.* (emphasis added).

Congress plainly did not intend to leave the INS discretion to adopt the very policy it was forbidding.[1]

## II

We conclude Soler's allegations state a cause of action under the Mandamus and Venue Act of 1962, 28 U.S.C. § 1361 (1988), and the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1988).

### A

Assuming the facts to be as alleged, mandamus is an appropriate means of compelling the INS to schedule Soler's deportation hearing in a manner consistent with Section 701.

Mandamus may not be used to instruct an official how to exercise discretion. *See e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170-71, 2 L.Ed. 60 (1803); *Wilmot v. Doyle*, 403 F.2d 811, 816 (9th

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[1] For this reason, the INS' apparent interpretation of Section 701 is entitled to no deference. Courts "must reject administrative constructions which are contrary to clear congressional intent." *Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837, 843 n. 9, 104 S.Ct. 2778, 2782 n. 9, 81 L.Ed.2d 694 (1984).

The INS' only argument in support of its alleged policy of delay is that Section 701 imposes upon it too great a fiscal burden. Congress, however, has concluded the INS is more capable of handling the burden of deportable alien prisoners than the federal and state prison systems, and that the burden more appropriately falls exclusively upon the federal government. As Representative MacKay stated:

> I do not believe [Section 701] would be unduly disruptive on the Federal system. If it is disruptive on the Federal system, that is where the disruption should be instead of where it is now, which is in the State systems.

132 Cong.Rec. H9794 (October 9, 1986).

Cir.1968). Mandamus is appropriate when an official's duty to act is ministerial in nature and so plain as to be free from doubt. *Moose v. United States*, 674 F.2d 1277, 1284 (9th Cir.1982); *Elliott v. Weinberger*, 564 F.2d 1219, 1226 (9th Cir.1977).[2] This does not mean an official's conduct is unreviewable because the official's responsibilities are in some respects discretionary. As the Supreme Court has long recognized, a "duty may be discretionary within limits. [The official] can not transgress those limits, and if he does so, he may be controlled by injunction or mandamus to keep within them." *Work v. U.S. ex rel. Rives*, 267 U.S. 175, 177, 45 S.Ct. 252, 69 L.Ed. 561 (1925) (Taft, C.J.). Thus, the "extent [of the officer's discretion] and the scope of judicial action in limiting it depend upon a proper interpretation of the particular statute and the congressional purpose." *Id.* at 178, 45 S.Ct. at 253. "In other words, even in an area generally left to agency discretion, there may well exist statutory or regulatory standards delimiting the scope or manner in which such discretion can be exercised. In these situations, mandamus will lie when the standards have been ignored or violated.' " *Carpet, Linoleum and Resilient Tile Layers,*

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[2] A duty may be plain even if the statute is ambiguous and "requires construction to determine the duties it creates. If the . . . duty is clear after the court interprets the statute, the court has jurisdiction [under the Mandamus Act]." *Pile-drivers' Local Union No. 2375 v. Smith*, 695 F.2d 390, 392 (9th Cir.1982) (citation omitted). *See also Knuckles v. Weinberger*, 511 F.2d 1221, 1222 (9th Cir.1975) ("once the court interprets the law, the defendant's duty will be clear"); *Roberts v. United States*, 176 U.S. 221, 231, 20 S.Ct. 376, 379, 44 L.Ed. 443 (1900). Thus, the fact that legislative history is consulted in construing Section 701 does not preclude mandamus.

*Local Union No. 419 v. Brown*, 656 F.2d 564, 566 (10th Cir.1981) (quoting *Davis Associates, Inc. v. Secretary, Dep't of Hous. and Urban Dev.*, 498 F.2d 385, 389 n. 5 (1st Cir.1974)).

The cases of *Ganem v. Heckler*, 746 F.2d 844 (D.C. Cir.1984), and *Commonwealth of Pennsylvania v. National Ass'n of Flood Insurers*, 520 F.2d 11 (3d Cir. 1975), are illustrative.

In *Ganem*, the petitioner sought mandamus to compel the Secretary of Health and Human Services to determine whether the nation of Iran discriminated against Americans in its social service programs. The Secretary was required by law to determine whether such discrimination existed, and, if it did not, to award benefits to eligible Iranians. *Ganem*, 746 F.2d at 846. The Secretary chose to determine the content of Iranian law only by direct contact with Iranian officials, a practical impossibility because of the interruption of diplomatic relations between the two nations. *Id.* at 847, 853. The court concluded the Secretary could be compelled by mandamus to adopt realistic means for determining Iranian law and her failure to do so "completely contravene[d]" the purpose of the Act to make Social Security Benefits available to eligible Iranians. *Id.* at 853-54. The court recognized the Secretary retained "discretion in the method by which she chooses to determine foreign law, but that discretion must be exercised . . . consistent with the statutory purposes." *Id.* at 854. "It is simply not within the Secretary's discretion," the court held, "to deprive entitled beneficiaries of their earned rights by virtue of a policy position that virtually assures the Secretary's inability to make a determination which the statute obligates her to make." *Id.* The Secretary's refusal to determine Iran-

ian law by realistic means was "a clear abnegation of [her] statutory responsibilities," *id.* at 848, and could be corrected by mandamus.

The statute involved in *Commonwealth of Pennsylvania* provided the Secretary of Housing and Urban Development " 'shall from time to time take such action as may be necessary in order to make information and data [relating to flood insurance] available to the public. . . .' " *Commonwealth of Pennsylvania*, 520 F.2d at 26 (quoting 42 U.S.C. § 4020 (1988)). The court recognized that the phrase "as may be necessary" vested significant discretion in the Secretary to decide if and when information should be disseminated. *Id.* However, this discretion pertained only to when and how the Secretary acted, and did not "permit disobedience to the initial directive, implicit in the statutory framework, requiring the Secretary to first consider whether or not action should be taken." *Id.* (citing *Work*, 267 U.S. 175, 45 S.Ct. 252, 69 L.Ed. 561). Refusal to take this initial action would be a "*total failure* of the Secretary to perform [his] duties . . .," *id.* (emphasis in original), and warranted mandamus relief.

In this case, Congress intended that "deportation proceedings begin when a conviction takes place, the idea being that when the sentence is over, the person would be deported." 132 Cong.Rec. H9794 (October 9, 1986) (remarks of Representative MacKay). A policy of delaying prisoner deportation hearings until the expiration of a prisoner's term "transgress[es] th[e] limits," *Work*, 267 U.S. at 177, 45 S.Ct. at 252, of any discretion delegated to the INS by Congress. Such a policy insures, by definition, that Congress' purpose will not be carried out. It is "a clear abnegation of [the INS'] statutory responsibilit[y]," *Ganem*,

746 F.2d at 848, a "total failure of the [INS] to perform [its] duties." *Commonwealth of Pennsylvania*, 520 F.2d at 26. Mandamus is an appropriate remedy to compel compliance with Congress' unequivocal mandate.

B

Soler has also stated a claim for relief under the Administrative Procedure Act.[3]

The APA provides, "The reviewing court shall—(1) compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706; and "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. "These sections of the APA create a right of judicial review of agency action unlawfully withheld." *Rank v. Nimmo*, 677 F.2d 692, 698 (9th Cir.1982). *See also Carpet, Linoleum*, 656 F.2d at 566-67. Soler's complaint states a claim under these provisions. The INS' refusal to comply with the clear congressional command to initiate deportation proceedings as soon as practicable after conviction is necessarily "agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706.

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[3] Soler's petition does not rely upon the APA explicitly, but we are to construe his pro se pleadings liberally. *See Hughes v. Rowe*, 449 U.S. 5, 9, 101 S.Ct. 173, 175, 66 L.Ed.2d 163 1980); *United States v. Eatinger*, 902 F.2d 1383, 1385 (9th Cir.1990). Moreover, in *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 228 & 231 n. 4, 106 S.Ct. 2860, 2865 & 2866 n. 4, 92 L.Ed.2d 166 (1986), a case involving no pro se parties, the Supreme Court treated a petition filed under the Mandamus Act to compel agency action as a claim for relief under the APA, reasoning that on the facts of the case the two forms of relief were "in essence" the same. We adopt the same approach.

Judicial intervention at this stage is not premature. Though judicial review is limited to "final agency action," 5 U.S.C. § 704, application by the INS of a policy of delaying deportation hearings for incarcerated aliens until the expiration of the alien's prison term, is a final agency decision not to follow the statutory mandate in that case. Where an administrative decision "represent[s] 'agency recalcitrance . . . in the face of a clear statutory duty . . . of such magnitude that it amounts to an abdication of statutory responsibility' . . . 'the court has the power to order the agency to act to carry out its substantive statutory mandates.'" *Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C.Cir.1987) (quoting *Public Citizen Health Research Group v. Commissioner, Food & Drug Admin.*, 740 F.2d 21, 32 (D.C.Cir.1984)). "[T]he agency might forever evade our review and thus escape its duties if we awaited final agency action before reviewing th[e] claim." *Id. See also Public Citizen v. Bowen*, 833 F.2d 364, 367 (D.C.Cir.1987) ("In the nature of things, obviously, want of finality in the conventional sense cannot be a bar" to a claim that agency action was unlawfully withheld or unreasonably delayed within the meaning of 5 U.S.C. § 706(1)).

Soler cannot be faulted for failing to exhaust administrative remedies; the INS concedes no administrative remedies are available to him under the circumstances of this case.

## III

The district court nevertheless dismissed Soler's complaint on the ground that Section 701 created no implied private right of action, citing *Gonzalez v. INS*, 867 F.2d 1108 (8th Cir.1989). The district

court's conclusion that Soler's claim depends upon the existence of an implied private right of action under Section 701 was mistaken.

When a petitioner seeks to "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), it is not necessary to determine whether the underlying statute creates a private right of action. "The 'right of action' in such cases is expressly created by the Administrative Procedure Act. . . . A separate indication of congressional intent to make agency action reviewable under the APA is not necessary; instead, the rule is that the cause of action for review of such action is available absent some clear and convincing evidence of legislative intention to preclude review." [4] *Japan Whaling*, 478 U.S. at 231 n. 4, 106 S.Ct. at 2866 n. 4. *See also Sierra Club v. Peterson*, 705 F.2d 1475, 1478-79 (9th Cir.1983).

The same is true of a claim under the Mandamus Act to "compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. In *Legal Aid Society of Alameda County v. Brennan*, 608 F.2d 1319 (9th Cir.1979), we rejected the argument that a petitioner can proceed under the Mandamus Act only if the statute or regulation allegedly violated by the United States creates an implied private right of action. As we said in *Legal Aid Society:*

> Appellees do not seek recognition of a supplemental private enforcement mechanism. They do not seek damages for specific acts of discrimination against themselves. They ask only that the court review the government's own enforcement

[4] There is no indication in either the text or legislative history of Section 701 that Congress intended to preclude judicial review.

> effort against the standards established by the Executive Order and regulations. Review of this sort is an ordinary element of administrative enforcement schemes, absent clear indication to the contrary. Since the only relief sought in such a suit is that government officials be required to perform the non-discretionary duties imposed upon them by the Executive Order and regulations, the action is by definition compatible with the scheme established by the Order and regulations. The reluctance of courts to imply separate private enforcement rights from statutes or regulations which provide explicitly only for government enforcement procedures and penalties, *see, e.g., Cort v. Ash*, 422 U.S. 66, 78-80 [95 S.Ct. 2080, 2087-89, 45 L.Ed.2d 26 (1975)] . . . is not applicable. . . .

*Id.* at 1332. Similarly, Soler "do[es] not seek recognition of a supplemental private enforcement mechanism," but review by mandamus, "an ordinary element of administrative enforcement schemes." *Id.* Thus "[t]he reluctance of courts to imply private enforcement rights . . . is not applicable." *Id.*

In sum, a petitioner who has alleged a cause of action under the APA or the Mandamus Act need not rely upon an implied private right of action under any other statute.

## IV

We also reject the government's argument that Soler lacks standing.

Soler plainly meets the constitutional requirements for standing. He has alleged an injury in fact, illegal incarceration; that injury is fairly traceable to the INS' alleged policy of delaying deportation hearings until the alien's sentence has been served; and the

injury would be redressed by the relief requested, the holding of a deportation hearing as expeditiously as possible. *See Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982) (discussing the constitutional standing requirements).

Soler also meets the statutory requirements for standing under both the APA and the Mandamus Act. An individual has standing to bring a claim under the APA if "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute . . . in question." *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970). This requirement for standing "is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff." *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 399-400, 107 S.Ct. 750, 757, 93 L.Ed.2d 757 (1987) (citations omitted); *see also National Wildlife Federation v. Burford*, 871 F.2d 849, 852 (9th Cir.1989). The standing requirement is satisfied if plaintiff's interest has "a plausible relationship to the policies" underlying the statute. *Clarke*, 479 U.S. at 403, 107 S.Ct. at 759. Review is denied only "if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* at 399, 107 S.Ct. at 757.

Soler's claim is not "so marginally related to or inconsistent with the purposes implicit in [Section 701] that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* To the contrary, though Section 701 was apparently enacted for

the benefit of taxpayers rather than incarcerated aliens, Soler's suit advances the stated congressional purpose of reducing prison overcrowding caused by INS delay. Soler's suit thus has "a plausible relationship to the policies" underlying Section 701. *Id.* at 403, 107 S.Ct. at 759.

The Mandamus Act also contains a standing requirement. It may be invoked "to compel [a federal official] to perform a duty *owed to the plaintiff*." 28 U.S.C. § 1361 (emphasis added). The Seventh Circuit has concluded a duty is "owed to the plaintiff" if the plaintiff falls within the "zone of interests" protected by the underlying statute. *See, Jarecki v. United States*, 590 F.2d 670, 675 (7th Cir.1979). We agree.

Though far from identical in other respects, both the APA and the Mandamus Act are "ordinary element[s] of administrative enforcement schemes," *Legal Aid Society*, 608 F.2d at 1332, and both provide a basis for compelling an agency to take action which by law it is required to take. *See, e.g., id.* at 1331 (relying upon both the Mandamus Act and the APA to compel agency action). We see no reason to infer differing standing requirements for these two means of compelling wrongfully withheld agency action. Accordingly, Soler has standing under the Mandamus Act.

*Conclusion*

We reverse and remand to permit Soler to pursue his claims under the Mandamus Act and the APA.[5]

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[5] Soler has also argued the INS has violated the Equal Protection Clause, the Due Process Clause, 8 U.S.C. § 1252(a), and that he is entitled to discretionary relief under 8 U.S.C. § 1182(c). Because these claims were not presented to the district court and, in any event, appear to be meritless, we do not address them on appeal. *United States v. Greger*, 716 F.2d 1275, 1277 (9th Cir.1983).

This opinion shall constitute the judgment of the court. The mandate shall issue 14 days from this date. If a suggestion for rehearing en banc is timely filed, the mandate shall be stayed until the full court acts upon the suggestion, at which time the mandate shall issue forthwith.[6]

RYMER, Circuit Judge, dissenting:

I agree that Congress has said what it expects the INS to do, pretty clearly. But I disagree that Soler has made out a clear claim to relief on account of a duty owed to him, as the Mandamus Act requires. 28 U.S.C. § 1361; *see Nova Stylings, Inc. v. Ladd*, 695 F.2d 1179, 1180 (9th Cir.1983). Federal prisoners were not the intended beneficiaries of section 701 of the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1252(i); the legislative history indicates that states, and overcrowded prisons, were. *See* 132 Cong.Rec. H9794-95 (daily ed. Oct. 9, 1986), S16909 (daily ed. Oct. 17, 1986); *Gonzalez v. INS*, 867 F.2d 1108, 1110 (8th Cir.1989). For this reason, I would affirm.

Unlike the majority, I also would not try to fashion a claim under the Administrative Procedure Act. Soler's petition does not assert an APA claim, and we did not ask the government to brief the issue. While we are certainly obliged to construe pro se pleadings liberally, that obligation does not require us to go off on an untested theory. We could have appointed counsel for Soler and invited a response from the INS. Given that we have done neither, I respectfully dissent.

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[6] On remand, the district court may wish to consider appointing counsel to assist Soler if, in its judgment, such an appointment would be helpful to the court.

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 89-16051

D.C. No. CV-89-0234-WDB

CARLOS SOLER, PLAINTIFF-APPELLANT

*v.*

ROGER F. SCOTT, Warden, FCI-Safford, AZ;
UNITED STATES BUREAU OF PRISONS;
U.S. IMMIGRATION AND NATURALIZATION SERVICE,
DEFENDANTS-APPELLEES

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ORDER

[Filed Nov. 4, 1991]

Before: BROWNING, GOODWIN and RYMER, Circuit Judges.

Appellees' Motion to Dismiss and Vacate Decisions Below is denied. *See Armster v. United States District Court*, 806 F.2d 1347 (9th Cir. 1986).

**APPENDIX C**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 89-16051

D.C. No. CV-89-0234-WDB

CARLOS SOLER, PLAINTIFF-APPELLANT

*v.*

ROGER F. SCOTT, Warden, FCI-Safford, AZ;
UNITED STATES BUREAU OF PRISONS;
U.S. IMMIGRATION AND NATURALIZATION SERVICE,
DEFENDANTS-APPELLEES

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ORDER

[Filed Apr. 9, 1992]

Before: BROWNING, GOODWIN and RYMER, Circuit Judges:

A majority of the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is DENIED, and the suggestion for rehearing en banc is REJECTED.

**APPENDIX D**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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CIV 89-234-GLO-WDB

CARLOS SOLER, PETITIONER

*v.*

ROGER F. SCOTT, WARDEN, ET AL., RESPONDENT(S)

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ORDER

[Filed Jun. 13, 1989]

Carlos Soler, confined at the Federal Correctional Institution-Safford, Arizona, has filed with the Clerk of the Court a *pro se* petition for writ of Mandamus pursuant to 28 U.S.C. section 1361. The Clerk of the Court has granted permission to file the petition without payment of fees pursuant to Local Rule 31(a)(8).

Petitioner alleges that he is "an alien in the custody of the U.S. Bureau of Prisons (BOP), having been convicted of offense(s) which may subject him to deportation." Petitioner further alleges he is the subject of a notice sent by the Immigration and Naturalization Service (INS) to the BOP, advising the BOP that the petitioner is subject to deportation and that such notice has been recognized by the BOP as a Detainer. Petitioner further alleges that pursuant to 8 U.S.C. sections 1252(a) and (i), the Attorney General has a statutory duty to begin and conduct deportation proceedings as expeditiously as possible and that petitioner has received no response to his

request that such proceedings be instituted. Petitioner seeks to execute or expunge the Detainer.

Petitioner asserts that the Court has jurisdiction to entertain his motion for writ of mandamus pursuant to 8 U.S.C. Section 1252(a). Section 1252(a) provides in pertinent part that:

> (a) Arrest and custody/review of determination by court. Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien *may upon warrant of the Attorney General, be arrested and taken into custody.* Any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole. But such bond or parole, whether heretofore or hereafter authorized, may be revoked at any time by the Attorney General in his discretion, and the alien may be returned to custody under the warrant which initiated the proceedings against him and detained until final determination of his deportability. *Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circum-*

> *stances in the case of any alien to determine deportability.* [Emphasis added].

Section 1252(a) by its terms is not applicable to the case at bar. First, pursuant to the statute the Attorney General is not required to make a determination of deportability until the alien is in INS custody. *Id.; Campillo v. Sullivan,* 853 F.2d 593, 596 (8th Cir. 1988). Second, section 1252(a) requires that a determination on the issue of detention, release on bond or parole be made by the Attorney General before the Court has jurisdiction to review the Attorney General's decision. *See, Id.* at 596.

In the instant case, petitioner alleges that he is in the custody of the Federal Bureau of Prisons pursuant to a federal conviction. The INS has issued a detainer to the officials who currently have custody of petitioner. The INS has not yet taken custody. Further, the Attorney General has not made a decision in petitioner's case concerning detention, release on bond or parole. Therefore, section 1252(a) does not grant this Court jurisdiction to review petitioner's Petition for writ to Compel Agency Action.

Petitioner also alleges that 8 U.S.C. Section 1252(i) provides a statutory right to a prompt deportation hearing. Section 1252(8) provides:

> (i) In the case of an alien who is convicted of an offense which makes the alien subject to deportation, the Attorney General shall begin any deportation proceeding as expeditiously as possible after the date of the conviction.

In *Gonzalez v. U.S. Immigration and Naturalization Service,* 867 F.2d 1108, 1109-10 (8th Cir. 1989) the Eighth Circuit held that section 1252(i) does not provide incarcerated aliens an implied private right

of action to compel an immediate deportation hearing. *Id.* at 1109 (citing *Cort v. Ash*, 422 U.S. 66, 78, 85 S.Ct. 2080, 2088, 45 L.Ed.2d 26 (1975). Instead, the legislative history of the statute indicates that one of Congress's main purposes in enacting this section was to address the issue of prison overcrowding. *Gonzalez*, 867 F.2d at 1110.

IT IS THEREFORE ORDERED that the petition be dismissed.

DATED this 12th day of June, 1989.

/s/ William D. Browning
WILLIAM D. BROWNING
United States District Judge

**APPENDIX E**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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Case No. ————

CARLOS SOLER, PETITIONER

*vs.*

ROGER F. SCOTT, Warden, F.C.I.—Safford, AZ, U.S. BUREAU OF PRISONS, IMMIGRATION AND NATURALIZATION SERVICE, Phoenix, AZ, RESPONDENTS

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PETITION FOR WRIT TO COMPEL AGENCY ACTION PURSUANT TO TITLE 28 USC § 1361

COMES NOW, Carlos Soler, Petitioner herein appearing in pro se, to seek an ORDER pursuant to Title 28 USC § 1361, in the nature of Mandamus, to compel the Immigration and Naturalization Service (INS) to perform a duty owed to the Petitioner. The duty is grounded in Title 8 USC § 1252(i), which requires the Attorney General to begin any deportation proceeding as expeditiously as possible.

Mandamus is the appropriate remedy for compelling an administrative office or agency to perform a required duty, *Martinez v. Richardson*, 472 F.2d 1121 (10thCir.1973), and if a duty exists on the part of defendants not only is there jurisdiction under Title 28 USC § 1361, but Petitioner has also adequately stated a claim in asking that such duty be fulfilled, *Davis Assoc., Inc. v. Secretary, Dept. of HUD*, 498 F.2d 385 (1stCir.1974).

## JURISDICTION AND VENUE

Jurisdiction for this action is grounded in Title 28 USC §§ 1331 and 1361, while venue resides in Title 28 U.S.C. § 1391(e).

## PARTIES TO THIS ACTION

Petitioner is a prisoner in the custody of the U.S. Bureau of Prisons at the Federal Correctional Institution at Safford, Arizona, pursuant to a conviction(s) for offense(s) against United States law(s) which may subject him to deportation by the INS.

Roger F. Scott, Warden, is named Respondent herein in his official capacity as the lawful custodian of the Petitioner.

The U.S. Bureau of Prisons is named as Respondent herein as it is the party which holds the Petitioner pursuant to the notice it has received from the INS, and which notice it considers as a Detainer.

The INS is named as Respondent herein as being the party which is responsible for performing the duty owed the Petitioner and as the party which originated the notice that the Respondent U.S. Bureau of Prisons considers as a Detainer.

## STATEMENT OF THE CASE

Petitioner is an alleged alien in the custody of the U.S. Bureau of Prisons (BOP), having been convicted of offense(s) which may make him subject to deportation.

Petitioner is the subject of a notice sent by the INS to the BOP, advising the BOP that the Petitioner is subject to deportation and such notice has been recognized by the BOP as a Detainer. Attached hereto and made a part hereof by reference thereto is a copy of

the INS notice and the BOP Detainer Action Letter marked EXHIBIT A and B respectively.

Petitioner has corresponded with the INS seeking to have the deportation proceedings started. Attached hereto and made a part hereof by reference thereto is a copy of Petitioner's letter to the INS, Phoenix, AZ office, dated February 13, 1989, marked EXHIBIT C; copies of additional correspondence from the Petitioner to the INS, Portland, OR office, dated December 7, 1988, and January 3, 1989 are marked EXHIBIT D and E respectively.

Petitioner has received no response(s) within thirty (30) days of his requests and therefore takes this as a denial thereof.

## ARGUMENT

Since the BOP administrative remedy procedure which is available to the Petitioner is ineffective inasmuch as the BOP is neither empowered to provide the deportation hearing nor to force the INS to provide it (*See*, attached hereto and made a part hereof by reference thereto, a copy of Petitioner's Inmate Request to Staff Member dated March 3, 1989, requesting the INS begin deportation proceedings marked EXHIBIT F), resort to the BOP administrative remedy procedure is not required. *See, Davis v. U.S. Dept. of HEW*, 416 F.Supp. 448 (S.D.N.Y. 1976) (resort to administrative remedies is not required where the administrative agency is not empowered to grant the relief requested).

There being no administrative remedy through the INS for the refusal to grant the deportation hearing upon a request by the Petitioner, exhaustion of administrative remedies is not at issue. Deciding the matter herein presented to the court does not involve

a decision wherein the agency must use its specialized expertise, so there is no reason for requiring exhaustion. Furthermore, it would be inappropriate in any case to deny judicial review for failure to exhaust the remedy of giving the agency the opportunity to resolve the complaint when it is the agency's refusal to grant the Petitioner the requested deportation hearing that is being brought before this Court.

Petitioner seeks to expunge or execute the Detainer as is required by the Immigration Reform and Control Act, Pub. L. No. 99-603, Title VI' § 701(1986), which imposes on the Attorney General a duty to begin deportation proceedings against convicted aliens "as expeditiously as possible after the date of conviction", at Title 8 USC § 1252(i).

The Attorney General has failed to meet this duty by not initiating a deportation investigation or scheduling a deportation hearing some 12 months after the date of his conviction. This delay also violates Title 8 USC § 1252(a)' which requires the Attorney General to conduct deportation proceedings with reasonable dispatch.

Petitioner asserts that the INS has failed in his case to meet these statutory duties and that it has no intention of ever doing so unless compelled to, by this Court, inasmuch as the INS has a long-standing policy of refusing to begin any deportation proceedings until after release from BOP custody.

Any doubt that Congress intended deportation proceedings to begin immediately following conviction, as opposed to following the date of release from incarceration was dispelled in November, 1986, with passage of the Immigration Reform and Control Act, Pub. L. 99-603. In the Act, Congress specifically amended Title 8 USC § 1252 to an unambiguous mandate that:

> In the case of an alien who is convicted of an offense which makes the alien subject to deportation, the Attorney General shall begin deportation proceedings as expeditiously as possible after the date of the conviction.

Section 701, codified as Title 8 USC § 1252(i).

According to the amendment's drafter, Representative MacKay, the purpose intended was that when the sentence is over those who were to be deported should be deported on an expedited basis. *See*, 132 Cong.Rec. H9791 (Daily Ed., October 9, 1986).

By delaying actual exclusion proceedings after the incarceration for Petitioner's criminal conviction, existing government policy guarantees additional costs of incarceration during the post-incarceration proceedings; and this is precisely what Congress sought to avoid in enacting Title 8 USC § 1252(i). That the INS policy is to not act until release by the BOP has occurred was recognized by the court in both *Gomez v. Sullivan*, D.Minn. Civ. No. 5-86-306, decided on April 3, 1987, and again in *Campillo v. Sullivan*, D.Minn. Civ. No. 5-86-308, decided on May 20, 1987.

Interpreting § 1252(i) to require deportation proceedings *during* the period of incarceration fully comports with other provisions of Title 8 USC § 1252. For example, § 1252(c) provides that the final order of deportation entered against an alien in legal detention or confinement "shall be considered as being made as of the moment he is released from such detention or confinement, and not prior thereto." This by no means bars initiating and completing the deportation hearing that will result in a final order which will mature only as of the moment of the Petitioner's release.

Nor do deportation proceedings during incarceration conflict with § 1252(h) which provides that "an

alien sentenced to imprisonment shall not be deported until such imprisonment has been terminated by the release of the alien from confinement." *See, Argiz v. U.S. Immigration*, 704 F.2d 384, 388-89 (7thCir. 1983) (suggesting that § 1252(h) does not permit the Attorney General to defer a final determination on deportation merely because an alleged alien is confined and may not actually be deported unless released.). The statutory mandate to expeditiously begin proceedings by no means requires that deportation, if appropriate, must occur prior to termination of confinement.

## RELIEF SOUGHT

Petitioner seeks as relief expungment of the Detainer unless the INS executes the Detainer by finalizing deportation proceedings and rendering a decision within sixty(60) days. As the INS has already had 12 months in which to comply with the statutory duty owed this Petitioner, and will still have a further 2 months yet in which to comply, it should not be an onerous burden. It would, however, be an onerous burden for the Petitioner to spend additional time imcarcerated [*sic*] and an additional onerous burden for United States taxpayers to pay for this incarceration because the INS does not want to obey the law.

Respectfully Submitted,

/s/ Carlos Soler
CARLOS SOLER

Reg. No. 56706-065
R.R. 2, Box 9000
Safford, AZ 85546

Petitioner in pro se

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITION FOR WRIT TO COMPEL AGENCY ACTION PURSUANT TO TITLE 28 USC § 1361 was placed in the United States Mail, postage prepaid, this 15th day of March, 1989, addressed to:

Office of the United States Attorney
P.O. Box 1951
Tucson, AZ 85702

U.S. Dept. of I&NS
230 N. First Avenue
Phoenix, AZ 85025

/s/ Carlos Soler
CARLOS SOLER

EXHIBIT A

DETAINER

0010 04/12/88 0757 (27HP)

0012 INS ORINSPDS0 04/12/88 0757 (24 G)
US MARSHAL SERVICE

PLEASE PLACE A U.S. IMMIGRATION HOLD ON THE FOLLOWING SUBJECT:

SUBJECT: NAM/SOLER, CARLOS
TRUE NAME/SOLER-AMOR, CARLOS
DOB/112855
FBI/550649N4
SID/4160826
INS/A19 604 297

PLEASE NOTIFY US OF ANY TRANSFER AFTER CONVICTION OR PRIOR TO ANY RELEASE BY THE INS NUMBER.

THANK YOU FOR YOUR COOPERATION.

ED FISHER
USINS, SA
PORTLAND, OR
503-221-2168

ECP

EXHIBIT B

U.S. Department of Justice
Federal Bureau of Prisons

Institution FCI SAFFORD, ARIZONA

Date 01-24-1989

DETAINER ACTION LETTER

TO: Officer In Charge, US INS
300 West Congress St. FB 37
Tucson, AZ 85701

Inmate's Name Soler, Carlos Amor

Number 56706-065

Your Soler-AMOR, Carlos

Number A19604297

Dear Sir:

The below checked paragraph relates to the above named inmate:

☐ This office is in receipt of the following report regarding the above named: _____
_____. Will you please investigate this report and advise what disposition, if any, has been made of the case. If subject is wanted by your department and you wish a detainer placed, it will be necessary for you to forward a certified copy of your warrant to us along with a cover letter stating your desire to have it lodged as a detainer, or indicate you have no further interest in subject.

☒ A detainer has been filed against this subject in your favor charging Deportation. Release is tentatively scheduled for 12-03-1995 [illegible], however we will again notify you approximately 60 days prior to actual release.

☐ Enclosed is your detainer warrant. Your detainer against the above named has been removed in compliance with your request.

☐ Your letter dated ———— requests notification prior to the release of the above named prisoner. Our records have been noted. Tentative release date at this time is ————.

☐ I am returning your ———— on the above named inmate who was committed to this institution on ———— to serve ———— for the offense of ————. If you wish your ———— filed as a detainer, please return it to us with a cover letter stating your desire to have it placed as a hold or indicate you have no further interest in the subject.

☐ The above named inmate has been transferred to ————. Your detainer/notification request has been forwarded.

☐ Other: This detainer was filed by INS Portland, Or by Ed Fisher. A copy of the teletype is enclosed.

Sincerely,

/s/ Patricia
Inmate Systems Manager

EXHIBIT C

Carlos Soler
Reg. # 56706-065
R.R. 2, Box 9000
Safford, AZ 85546
February 13, 1989

U.S. Department of Immigration
and Naturalization
ATTN: Mr. William Cravener
230 N. First Avenue
Phoenix, AZ 85003

RE: SOLER, Carlos aka SOLER-AMOR, Carlos
INS File # A19 604 297

Dear Mr. Cravener;

I am currently in the custody of the U.S. Bureau of Prisons and your Department has placed a "Hold" on me. Attached hereto is a copy thereof.

I hereby request, pursuant to Title 8 of the United States Code, Section 1252(i), that your Department decide the issue of my deportation immediately, inasmuch as 1252(i) does not permit the Attorney General to defer a final determination on deportation merely because an alleged alien is confined and may not be deported until released. See, *Argiz v. U.S. Immigration*, 704 F2d 384, 388-89.

Should your Department decide not to grant any request I would appreciate being advised of what Administrative Remedies are available to me.

Some additional pertinent information that may be of assistance to you is that I was born in Havana, Cuba on November 28, 1955, and have been a resident of this country since 1970, approximately 19

years. I am a bona fide resident of the State of Oregon and am married to Mrs. Barbara Soler (a natural citizen), 13446 N.E. Sandy Blvd., Apt. #S-1, Portland, Oregon 97230; we have one child from this union, a daughter nine months of age. I also have an 11 year old daughter who presently resides with my cousin.

Also, in July, 1985, while serving a two-year sentence for the State of Oregon, I was faced with the identical INS problem. At that time I filed a legal action in the Marion County Court in Salem, Oregon. The Oregon State court ordered my release from the INS detainer. Ms. Velda Rogers was appointed by the court and served as my representative in that matter. The case number is Civ. No. 86-C-11565.

Hopefully you can assist me in this matter as the "Hold" is having an adverse effect upon my custody and program classifications as well as my institutional designation. Therefore, I am awaiting your response at your earliest convenience.

Sincerely,

/s/ Carlos Soler
CARLOS SOLER

xc: file

EXHIBIT D

DECEMBER 7, 1988

DISTRICT COUNSEL
IMMIGRATION & NATURALIZATION SERVICE
P.O. BOX 3361
PORTLAND, OR. 97208-3361

CARLOS SOLER REG #56706-065
1299 SEASIDE AVENUE P.O. BOX 3007
F.C.I. P.O. BOX 3007 "2C" UNIT
SAN PEDRO, CALIFORNIA 90731

D.O.B. : 11/28/55
P.O.B. : HABANA, CUBA
L.N.S. : REG #A-19604297

DEAR SIR:

I AM AN INMATE OF THE TERMINAL ISLAND PRISON. I AM HERE TEMPORALLY BUT I AM DESIGNATED TO STAFFORD, ARIZONA, FCI. BECAUSE I MAY BR RETURNED TO STAFFORD AT ANY TIME (ALTHOUGH REDESIGNATION TO TERMINAL ISLAND IS A POSSIBILITY, AND, IN ANY, EVENT, I HAVE ALREADY BEEN HERE FIVE MONTHS) I MUST REQUEST THAT YOU SEND YOUR REPLY TO THIS INQUIRY TO ME AT MY ADDRESS AT TERMINAL ISLAND.

I HAVE BEEN TOLD BY THE PRISON ADM. AT TERMINAL ISLAND THAT I HAVE AN INS DETAINER. HOWEVER, THEY REFUSE TO FURNISH ME WITH A COPY OF THIS DETAINER, IF INDEED YOU HAVE ONE, OR WILL YOU PLEASE REFER ME TO THE AP-

PROPRIATE OFFICE TO WHICH TO MAKE THIS REQUEST BY SENDING ME T THE CORREST ADDRESS & TELEPHONE NUMBER.

SINCERELY YOURS,

/s/ X
Carlos Soler

CS/cs

EXHIBIT E

Carlos Soler-Amor
Fed. No. #56706-065
F.C.I., Terminal Isl. 90731

January 3, 1989

Mr. Ed Fisher
U.S. Immigration & Naturalization Service
Federal Building
511 N.W. Broadway
Portland, OR.

Re: INS File No. #A19-604-297

Dear Mr. Fisher,

As can be noted from the return address, I am incarcerated at F.C.I., Terminal Island, CA. My purpose for writing you is to request your assistance in having an INS detainer action notice lifted from my central file, also from the computer files. The enclosed computer print-out, sent to this institution on April 12, 1988, spells out my problem for me. The records office here has classified this document as a "detainer", and is treating it as such. i.e. prevents any participation in furlough-type programs, custody reduction, security classification, etc.

In July, 1985, while serving a two (2) year sentence for the state of Oregon, I was faced with the same identical INS problem. At that time, I filed legal action in Marion County Court, Oregon State. The Oregon state court ordered my release from the INS detainer. (Civ. No. 86-C-11565/Replication). (Ms. Velda Rogers, Fed. Public Defender served as my representative in that matter.)

Sir, I am a bonafied resident of the state of Oregon, U.S.A., have resided in the United States for eighteen (18) years, am married to Mrs. Barbara Soler (A natural citizen), 13446 N.E. Sandy, Apt. #S-1, Portland, Oregon; W have one (1) child, eight months of age from our union.

Your cooperation in this matter will be immensely appreciated.

Thank You,

P.S. The attorney who handled the previous INS problem was: Velma Rogers, Keizer, Oregon, Phone: (503) 362-7910.

The following information is offered as an aid to facilitate the processing of my request:

Carlos Soler-Amor
Fed. Reg. No. #56706-065
INS File No. #A19-604-297
D.O.B. 11-28-55
F.B.I. #550649N4
S.I.D. #4160826

cc: File Copy (1)

EXHIBIT F

INMATE REQUEST TO STAFF MEMBER

Department of Justice
Federal Bureau of Prisons

Date 3/5/89

To: T. V. Krajenta.

SUBJECT: State completely but briefly the problem on which you desire assistance, and what you think should be done (Give details).

I wish to have the I.N.S. begin my deportation proceedings before my release from Bureau of Prisons custody, in compliance with 8 USC 1251(1), and would appreciate your initiating, the proces. If your are to do so, Please advise me of what administrative remedies are available to me in this matter. Plus I would like if you find out about my transfer to Oregon I speck to you about two week and I have hear from you.

NAME: Carlos Soler

No.: 58706-065

Work assignment: Constrution 111

Unit: Doorn 3 27

NOTE: If you follow instructions in preparing your request, it can be disposed of more promptly and intelligently. You will be interviewed, if necessary, in order to satisfactorily handle your request. Your failure to specifically state your problem may result in no action being taken.

DISPOSITION: (Do not write in this space)

Date March 9, 1989

Contact with the Immigration & Naturalization Service has determined that it will be necessary for you to make this request to U.S.I.N.S. District Director.

Federal Building
230 N. 1st Ave.
Phoenix, AZ 85025

Also, regarding your transfer, please see attached letter.

/s/ T. V. Krajente, AW (O)

**APPENDIX F**

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 89-16051

CARLOS SOLER, PLAINTIFF-APPELLANT

*v.*

ROGER F. SCOTT, Warden, FCI-Safford, AZ; UNITED STATES BUREAU OF PRISONS; UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, DEFENDANTS-APPELLEES

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## APPELLEES' MOTION TO DISMISS AND VACATE DECISIONS BELOW

The instant case challenges the scope of discretion of appellee Immigration and Naturalization Service "INS") in determining the timing of immigration hearings for incarcerated aliens. As previously noted in a letter to the Court dated September 20, 1991, on September 13, 1991, appellant completed his criminal sentence and was released from the Federal Correctional Institution at Sheridan, Oregon. At that time an INS detainer earlier placed upon him was executed and appellant was taken into custody by appellee INS. However, as previously noted in a letter to the Court dated October 3, 1991, it is the position of appellees that these circumstances did not render the instant case moot.

However, the undersigned has been informed that on October 8, 1991, appellant appeared for a pre-

liminary exclusion hearing, with the matter being continued until October 15 because his attorney was on vacation. Appellees therefore now move that the instant case be dismissed for mootness.

Appellees also move this Court to vacate the panel decision and the judgment below. When a civil case becomes moot pending a decision on the merits by an appellate court, the Supreme Court has held that the "established practice" is "to reverse or vacate the judgment below and remand with a direction to dismiss." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). *See also, e.g., Great Western Sugar Co. v. Nelson*, 442 U.S. 92 (1979); *Preiser v. Newkirk*, 422 U.S. 395 (1975); *Parker v. Ellis*, 362 U.S. 574 (1960); *Duke Power Co. v. Greenwood County*, 299 U.S. 259 (1936); *Phillips v. McLaughlin*, 854 F.2d 673 (4th Cir. 1988). This procedure assures that the previous judgment "will spawn no legal precedents." *Westberry v. Gilman Paper Company*, 507 F.2d 206, 216 (5th Cir. 1975) (en banc).

A similar procedure is, if not absolutely required, completely appropriate in the instant case, which has become moot at a stage where the appellees have filed a timely petition for rehearing, with suggestion for rehearing en banc, and the Court already has recognized enough merit in the petition to order the appellant to respond. Under these circumstances, failure to vacate the panel and district court decisions would be particularly unjust to the appellees, who expect that publication of the panel decision will "spawn" a host of district court actions from incarcerated aliens seeking immediate immigration hearings.

Respectfully submitted,

STUART M. GERSON
Assistant Attorney General

MARK C. WALTERS
Assistant Director

/s/ Alison R. Drucker
ALISON R. DRUCKER
Attorney
Office of Immigration Litigation
Civil Division
Department of Justice
Post Office Box 878
Ben Franklin Station
Washington, D.C. 20044
(202) 501-6529

Attorneys for Appellees

Dated: October 10, 1991

## CERTIFICATE OF SERVICE

I HEREBY certify that on this 10th day of October, 1991, one copy of the foregoing Appellees' Motion to Dismiss and Vacate Decisions Below served upon *pro se* appellant by mailing the copy postage prepaid to:

Mr. Carlos A. Soler
Yamhill County Jail
5th and Evans
McMinnville, Oregon 97128

/s/ Alison R. Drucker
ALISON R. DRUCKER
Attorney
Department of Justice

**APPENDIX G**

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
SEATTLE, WA

File No. 19-604-297

IN THE MATTER OF: )
)
SOLER-AMOR, CARLOS )
IN EXCLUSION PROCEEDINGS )

TO: ——— District Counsel
Pro Se Immigration & Natz. Service
——— Portland, Oregon

## EXCLUSION ORDER

(telephonic with Portland, OR)

A hearing on the above matter was held at Seattle, WA on the 17 day of October, 1991. All parties were present. Based on the entire evidence of record, including applicant's oral testimony and documentation, the following order is entered:

IT IS ORDERED that applicant is excludable under Section 212(a)(2)(A)(i)(II) (——) and (——) of the Immigration and Nationality Act of 1952, and is hereby excluded and deported from the United States.

The Service contends that applicant is ineligible for administrative relief pursuant to 8 C.F.R. 208.14 (c)—(effective as of 10/1/90), wherein the statu-

tory bar of Section 243(h), withholding of deportation is extended to Section 208, political asylum, in cases such as this which pose a threat to the community.

A copy of this decision has been served upon the parties.

Date: 10-17, 1991

Place: Seattle, WA

/s/ Daniel L. Kahn
Immigration Judge
Seattle, Washington

Appeal reserved by Alien, due by 10-28-91

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45488